upon Federal power, leaving the right to enforce restrictions on speech to the States.

"The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed? Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid. As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument.

" 'The law is perfectly well settled,' this Court said over fifty years ago, 'that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.' Robertson v. Baldwin, 165 U. S. 275, 281, 41 L. ed. 715, 717, 17 S. Ct. 326. That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years. See, e. g., Gompers v. United States, 233 U. S. 604, 610, 58 L. ed. 1115, 1119, 34 S. Ct. 693, Ann. Cas. 1915D 1044. Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic

society as well as the interest in national security are better served by candid and informed weighing of the competing interests within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved." (Emphasis supplied)

In the same case, this court, in concluding that "speech is not an absolute, above and beyond control by the legislature," stated:

> "But we further suggested that neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case. *Speech is not an absolute, above and beyond control by the legislature, when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction.* Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. See Douds, 339 U. S. at 397, 94 L. ed. 942, 70 S. Ct. 674. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative." * * *
>
> "Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish.

"Obviously, the words cannot mean that before the Government may act, *it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.* The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the imminency of a successful attempt." (Emphasis supplied)

The right of the several states by legislative action to adopt regulations commensurate with the need in the exercise of their reserve powers to maintain law and order and to protect the welfare of their citizens has never been questioned. There is a wealth of authority supporting this view, and we cannot better express the history and development of this type of legislation than was stated by Justice Bell in the brilliant and erudite dissenting opinion in the court below, in which he observed:

"1. State sedition and treason laws were nothing new; they had existed for over 100 years. Congress knew that in spite of the fact that the Constitution of the United States gave it, in Article III, Sec. 3(2), the power to punish treason, *forty-seven* (47) Sovereign States of the United States of America, vitally

and patriotically concerned with the safety of their citizens, the security of our country and the preservation of their State and Country's Governments, have a Constitutional provision or had passed laws (as early as 1818) punishing the crime of treason. (Federal Bar Assn. Journal, Vol. 9, p. 71 (1947)). Congress also knew that *thirty-seven* (37) Sovereign States had over a long period of years passed statutes defining and punishing sedition, syndicalism, and other activities aimed at the overthrow of our government by force. (Annual Report of the Committee on Un-American Activities for the year 1949; House Report No. 1950, Union Calendar No. 427, 81st Congress, 2nd session, page 30.) All of these State statutes throughout our entire Country will be superseded and suspended or invalidated, if the majority opinion in this case is sustained by the Supreme Court of the United States.

"In 1790 Congress enacted an Act defining and punishing treason. (18 U. S. C. Secs. 1 and 2.) In 1861 Congress passed the Sedition Conspiracy Act. (18 U. S. C. Sec. 6.) *Nevertheless has the Supreme Court of the United States held that the congressional act punishing treason or the congressional act punishing sedition preempted the field or superseded and nullified state acts punishing these crimes*, or prohibited states from thereafter passing complementary statutes punishing these crimes. While this is not conclusive it is certainly persuasive that Congress did not intend by the Smith Act to supersede and invalidate the mass of state legislation punishing treason, sedition, criminal anarchy, etc., some of which has been in existence for 100 years. Furthermore, *twenty-six* (26) States have passed laws which expressly or in effect *deny state employment* to persons who teach or advocate the overthrow of government by force or violence, or who print or sell documents advocating such doctrines, or who organize groups aimed at overthrowing the government. (Annual Report of the Committee on

Un-American Activities for the year 1949; House Report No. 1950, Union Calendar No. 727, 81st. Congress, 2nd session, page 45.) If the majority opinion prevails, isn't it clear as crystal that all these State laws will be superseded and suspended or invalidated by the Smith Act; and if so, what will it cost the States in the way of damages and other remedial actions? And if the majority opinion prevails, what will happen to all the traitors and dangerous criminals who have been convicted under state acts and whose sentences have not been finally determined, as well as those who are now in state jails serving sentences for violating state treason or sedition or similar laws? And most important of all, what will happen to the security of our Country when the patriotic efforts of all state legislatures, district attorneys and Courts and of all patriotic citizens anxious to catch and punish traitors, are rejected and the existence of our State and Nation is left exclusively to the slow processes of our sometimes apathetic or inept Federal Government?" (Vol. I, R. 71, 72)

In Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 Sup. Ct. 625 (1925), this court sustained a conviction under a statute of that state which made it a crime to "advocate * * * the necessity or propriety of overthrowing the government by force * * *." The evidence showed that Gitlow had published a Manifesto attacking the government and capitalism. In sustaining the conviction, this court recognized the necessity of applying certain exceptions to the right of freedom of speech, as guaranteed under the First Amendment, in the following language:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every

possible use of language, and prevents the punishment of those who abuse this freedom. 2 Story, Const. 5th ed. Sec. 1580, p. 634; (citing cases) * * * 'Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the Republic.' * * *

"And, for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional state. Freedom of speech and press, said Story supra, does not protect disturbances of the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government, or to impede or hinder it in the performance of its governmental duties. State v. Holm, 139 Minn. 275, L. R. A. 1918C, 304, 166 N. W. 888. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. People v. Most, 171 N. Y. 431, 432, 58 L. R. A. 509, 64 N. E. 175. And a state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. People v. Lloyd, 304 Ill. 23, 34, 136 N. E. 505. See also State v. Tachin, 92 N. J. L. 269, 274, 106 Atl. 145, and People v. Steelik, 187 Cal. 361, 375, 203 Pac. 75. In short, this freedom does not deprive a state of the primary and essential right of self-preservation, which, so long as human governments endure, they cannot be denied. United States ex rel. Turner v. Williams, 194 U. S. 279, 294, 48 L. ed. 979, 985, 24 Sup. Ct. Rep. 719. In Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. ed. 1186, 1193, 38 Sup. Ct. Rep. 560, it was said: 'The

safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions.'"

This court, in deciding the Gitlow case, did not adopt the "clear and present danger" doctrine advocated by Associate Justices Holmes and Brandeis, and in commenting on this fact in the later case of Dennis v. United States, *supra*, stated:

> "There a legislature had found that a certain kind of speech was, itself, harmful and unlawful. The constitutionality of such a state statute had to be adjudged by this Court just as it determined the constitutionality of any state statute, namely, whether the statute was 'reasonable.' Since it was entirely reasonable for a state to attempt to protect itself from violent overthrow, the statute was perforce reasonable."

In Whitney v. California, 274 U. S. 279 (1927), this court approved the validity of the Criminal Syndicalism Act of the State of California, the pertinent provisions of which were as follows:

> "The pertinent provisions of the criminal Syndicalism Act are:
>
> 'Section 1. The term "criminal syndicalism" as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. Any person who * * * Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism. * * *

"Is guilty of a felony and punishable by imprisonment, * * *"

and in the course of its opinion held:

"*The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need;* and is not to be overthrown merely because other instances may be suggested to which also it might have been applied; that being a matter for the legislature to determine unless the case is very clear. Keokee Consol. Coke Co., v. Taylor, 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 Sup. Ct. Rep. 856. And it is not open to objection unless the classification is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion. Stebbins v. Riley, 268 U. S. 137, 143, 69 L. ed. 884, 889, 44 A. L. R. 1454, 45 Sup. Ct. Rep. 424; Graves v. Minnesota, Nov. 22, 1926 (272 U. S. 425, ante 331, 47 Sup. Ct. Rep. 122); Swiss Oil Corp. v. Shanks, Feb. 21, 1927 (273 U. S. 407, ante, 709, 47 Sup. Ct. Rep. 393)." (Emphasis supplied)

This court recognized the fact that experience has shown that evils of this sort are most felt at the source—the state—and that the legislation was "co-extensive" with the practical need.

In State v. Tachin, 92 N. J. L. 269, 106 Atl. 845 (1919), which was cited with approval in Gitlow v. New York, *supra*, the Supreme Court of New Jersey held that a state act making it a crime to attempt, by speech, to incite

hostility and opposition to the Government of the United States was valid. In that decision the court said:

> "* * * If the federal government, which is a government of delegated powers only, under the Tenth Amendment to the federal Constitution, can properly protect by its criminal law the honesty and purity of elections, as the Siebold Case decided, much more can the State government protect its own existence against sedition which, although aimed directly at the federal government, must indirectly affect the security of the state government. * * *"

In the above case, a writ of error was dismissed by the Supreme Court of the United States on motion of counsel for the plaintiffs in error. (254 U. S. 662.)

In the late case of Nelson v. Wyman, — N. H. —, 105 A. 2d 756 (April 30, 1954), the Supreme Court of New Hampshire, in an action asking for declaratory judgment, held that the Subversive Activities Act which had been adopted by the Legislature of that state, was constitutional. This Act, which was adopted in 1951, provided that:

> "It shall be a felony for any person knowingly and willfully to
>
> "(a) commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force or violence, or
>
> "(b) advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the state of

New Hampshire or of any political subdivision of either of them; * * *' (N. H. Laws, 1951, pp. 412-413)"

In sustaining the constitutionality of this legislation, the court stated:

"* * * Whatever importance has been ascribed to these duties and powers in decisions dealing with federal legislation, their existence has not been applied in connection with state legislation, to exclude consideration of the well recognized power of each state to regulate the conduct of its citizens and to restrain activities which are detrimental not only to the welfare of the state but of the nation. 'The state is not inhibited from making the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.' Gilbert v. Minnesota, 254 U. S. 325, 331. 'There is nothing in the federal constitution in any way granting to the federal government the exclusive right to punish disloyalty.' People v. Lloyd, 304 Ill. 23, 33."

The court in that case refused to adopt the reasoning set forth in the majority opinion of the Pennsylvania Supreme Court herein, and came to the conclusion that the "Smith Act" did not supersede the New Hampshire legislation:

"The enactment by Congress of the Smith Act (18 USC Sec. 2385), which defines and penalizes sedition and subversive activities against the governments of the United States, the states or any of their subdivisions, does not preclude state legislation on the same subject matter. Insofar as Pennsylvania v. Nelson, 104 A. 2d 133, gives support to the proposition that it does, we do not adopt it. (104 A. 2d at p. 769)"

The cases cited and from which we have quoted illustrate the inescapable fact that this court has always recognized

the right of the states to adopt reasonable legislation in their respective jurisdictions for the preservation of law and order and in the public interest; and in so doing "to consult solely their own notions of policy in formulating penal codes and in administering them, except those granted to Congress under the constitution, including the Bill of Rights," Malinksy v. New York, *supra;* as "the power to define crime belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers," Rochin v. California, *supra,* and "the administration of criminal justice under our federal system has rested with the states except as criminal offenses have been explicitly prescribed by Congress." Jerome v. United States, *supra.*

The trial in the Dennis case extended over a period of nine months, six of which were devoted to the taking of evidence involving a record of sixteen thousand pages. In the instant case, the trial commenced on December 18, 1951 and was concluded January 30, 1952. (Vol. 1, R. 7, 8) The record before this court contains fourteen hundred twenty-one pages. In view of the great mass of state legislation which has been built up and the seditious acts which are constantly occurring in the promotion of communistic philosophy, it is hardly believable that Congress, which was aware of this situation, intended to restrict the police power of the state and pre-empt the field, thus losing the aid of the State Courts. Over the past several years, communist organizers have established many fronts, too numerous to mention herein, which are ever changing to new names. This has created an extra burden on the Department of Justice. The Attorney General, in his brief filed on behalf of the United States in Dennis v. United States supra, made mention of the fact that the "Smith Act" was constitutional inasmuch as it was a part of a

large mass of valid state and federal legislation designed to punish sedition and other subversive activities. He did not intimate that Congress had pre-empted the field, and the author of the Act had no such intention. Consequently, it is difficult to conceive, yes impossible, that the "Smith Act," by implication, voided the legislative acts of the various states which had for their purpose the preservation of their sovereign rights and the very life of the Nation.

The advocates of Communism have disseminated its principles in many local communities and in every state and when exposed they always hide behind the Bill of Rights but never recognize the obligations our Constitution entails, which every loyal citizen must observe if this fundamental law is to prevail.

The Preamble bears witness to the fact that the Constitution emanated from the people. McCullough v. Maryland, 4 Wheat 316, Downes v. Bidwell, 182 U. S. 244. They, the people, established this noble document *"in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty"* to themselves and their posterity. These were the purposes behind our fundamental law, and we find nothing therein which would justify a doctrine which is the antithesis of these precepts.

Communism starts in the community—the communities make up the state and the states compose the Union. Its philosophy, like dry rot, destroys from within. While the danger is present, it does not become clear until the damage is done. The human termites, which advocate its teaching by subversive means, attack the vital spots and destroy the fundamental structure upon which our government and that of the states is based, and under which they

operate; if the fight is not continued by the states, the damage may be so great that it cannot be rectified in time by Federal action. This could mean war, which would inevitably result in the loss of the lives of our youth, as in the past. The citizenry has every right to insist that the fight against this philosophy be combatted with all the might which can be marshalled by the states as well as the nation. Wars have always been won by our nation due to the close cooperation of the states, and this force should be used to win the fight against our internal enemies. Thus, if the field of correction is pre-empted by Congress, the Federal Government would be the only agency which could deal with this problem, and the states would be helpless to preserve their sovereign powers. This was never expressed, implied or intended by the "Smith Act." Like Caesar's ambition, as described by Shakespeare's Brutus

> "Then, lest he may, prevent. And, since the quarrel
> Will bear no colour for the thing he is,
> Fashion it thus; that what he is, augmented,
> Would run to these, and these extremities;
> And therefore think him as a serpent's egg,
> Which, hatch'd, would, as his kind, grow mischievous,
> And kill him in the shell."

we must destroy Communism at its source.

The lower court, without supporting authority, cited the disparity between the penalty prescribed under the "Smith Act" and the Pennsylvania Sedition Act, which it said "strongly argues that it was not the Congressional purpose that, after enactment of the "Smith Act," conflicting or disparate state statutes on the same subject should be called into play for the punishment of sedition against the United States." (Vol. I, R. 59)

The Federal Government could operate if the government of a state, or even a number of states, were disrupted by rebellion or insurrection. This was proven in the Civil War during which our government still functioned under the Constitution, although several states had seceded, *but no state could conceivably function under our federal system if the Federal Government were annihilated and our* fundamental constitutional structure was destroyed. As stated in Whitney v. California, *supra*, state sedition acts "must be presumed to be aimed at an evil where experience shows itself to be most felt, and to be deemed by the legislature co-extensive with the practical need." The difference between the length of sentence under the two Acts is not a conflict, as the Legislature of the Commonwealth of Pennsylvania apparently deemed it necessary to establish a penalty co-extensive "with the practical need" where it was most felt.

III

Double Jeopardy Is Not Involved In This Case

The lower court, in the course of its opinion, also stated that:

> "If conviction under the state's statutes for sedition against the Government of the United States were permitted to be operative in the face of the Smith Act, then double punishment for the same offense would be possible."

In the light of the decisions cited herein, this position is untenable.

In State v. Holm, *supra*, which was cited with approval in Gilbert v. Minnesota, *supra*, the state court said:

> "It is the duty of all citizens of the state to aid the state in performing its duties as a part of the Nation and the fact that such citizens are also citizens of the United States and owe a direct duty to the Nation does not absolve them from their duty to the state nor preclude the state from enforcing such duty."

In Gilbert v. Minnesota, *supra*, this court stated that the "fact that the citizens of the state are also citizens of the United States and owe a duty to the Nation, does not absolve them from duty to the state nor preclude a state from enforcing such duty. 'The same Act' it was said 'may be an offense or transgression of both Nation and state' and both may punish it without a conflict of sovereignties."

In Moore v. State of Illinois, *supra*, this court also said that:

> "Every citizen of the United States is also a citizen of the state or territory. He may be said to owe allegiance to two sovereigns and may be liable * * * for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both."

Again, in Ex parte Siebold, *supra*, it was stated that:

> "Where a person owes a duty to two sovereigns, he is amenable to both for its performance, and either may call him to account."

This principle was also approved by this court in Presser v. State of Illinois, *supra*, Halter v. State of Nebraska, *supra*, and United States v. Lanza, 260 U. S. 377 (1922).

In each of the foregoing cases, the question of preemption by Congress was an issue.

The contention of double jeopardy is without merit.

CONCLUSION

In summa, we submit that for the reasons herein stated, the Commonwealth of Pennsylvania had an inalienable right in the exercise of its police powers, to adopt and enforce the provisions of the Sedition Act in question herein, under which the respondent was convicted, and that this court should reverse the action of the Pennsylvania Supreme Court in quashing the indictment.

Respectfully submitted,

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APPENDIX I

Section 2385 of the Federal Code of Crimes and Criminal Procedure of June 25, 1948, 62 Stat. 808, 18 USCA 2385.

Section 2385 and Pertinent Portion of Section 2386 of the Federal Code of Crimes and Criminal Procedure of June 25, 1948, 62 Stat. 808—18 U. S. C. A. 2385, 2386:

§2385. Advocating overthrow of Government

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

APPENDIX II

Section 4207 of the Pennsylvania Penal Code of 1939, 18 Purd. Penna. Stat. Ann. 4207:

The word "sedition," as used in this section, shall mean:

Any writing, publication, printing, cut, cartoon, utterance, or conduct, either individually or in connection or combination with any other person, the intent of which is:

(a) To make or cause to be made any outbreak or demonstration of violence against this State or against the United States.

(b) To encourage any person to take any measures or engage in any conduct with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or of the United States.

(c) To incite or encourage any person to commit any overt act with a view to bringing the Government of this State or of the United States into hatred or contempt.

(d) To incite any person or persons to do or attempt to do personal injury or harm to any officer of this State or of the United States, or to damage or destroy any public property or the property of any public official because of his official position.

The word "sedition" shall also include:

(e) The actual damage to, or destruction of, any public property or the property of any public official, perpetrated because the owner or occupant is in official position.

(f) Any writing, publication, printing, cut, cartoon, or utterance which advocates or teaches the duty, necessity, or propriety of engaging in crime, violence, or any form of terrorism, as a means of accomplishing political reform or change in government.

(g) The sale, gift or distribution of any prints, publications, books, papers, documents, or written matter in any form, which advocates, furthers or teaches sedition as hereinbefore defined.

(h) Organizing or helping to organize or becoming a member of any assembly, society, or group, where any of the policies or purposes thereof are seditious as hereinbefore defined.

Sedition shall be a felony. Whoever is guilty of sedition shall, upon conviction thereof, be sentenced to pay a fine not exceeding ten thousand dollars ($10,000), or to undergo imprisonment not exceeding twenty (20) years, or both. 1939, June 24, P. L. 872, §207.

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No. 10

In the Supreme Court of the United States

OCTOBER TERM, 1955

COMMONWEALTH OF PENNSYLVANIA, PETITIONER

v.

STEVE NELSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

SIMON E. SOBELOFF,
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WILLIAM F. TOMPKINS,
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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	4
Argument:	
The Smith Act does not preclude enforcement of state sedition statutes	9
I. At least in the absence of congressional action to the contrary, the states have power to punish acts of sedition committed within their respective jurisdictions	11
II. Congress has not preempted the field of punishing seditious activities	16
A. The conclusion that the exercise of state police powers has been suspended is warranted only where the congressional purpose to effect that result is clearly manifested	17
B. The available direct evidence indicates that Congress intended to leave state legislation unaffected by the Smith Act	21
C. Federal enforcement experience has been that the state sedition laws, as administered by the states, do not stand as obstacles to the accomplishment of the full purposes and objectives of the Smith Act	30
D. No other factors support the inference that Congress intended to ban enforcement of state sedition laws	32

Argument—Continued
The Smith Act—Continued
II—Continued
Page
D. 1. The fact that the acts proscribed fall within a field of predominant federal interest does not of itself render the state statutes unenforceable 32
2. The statutes in question not being regulatory in nature, there is no possibility of conflict from that source 37
3. The fact that persons engaging in seditious activities are subject to punishment under both federal and state statutes does not in itself give rise to an inference that Congress intended to suspend the operation of the state statutes 43
III. If it should ever appear that the state statutes, as administered by the states, in fact stand as obstacles to the accomplishment of the full purposes and objectives of the Smith Act, Congress is free to enact legislation to eliminate such conflict 46
Conclusion 49
Appendix 50

CITATIONS

Cases:

Adler v. *Board of Education of the City of New York*, 342 U. S. 485 23
Albertson v. *Millard*, 106 F. Supp. 635, reversed, 345 U. S. 242 ..... 14, 38
Allen-Bradley Local v. *Board*, 315 U. S. 740 ..... 7, 18, 41, 47

Cases—Continued

Page

Auto Workers v. *Wisconsin Employment Relations Board*, 336 U. S. 245 18
California v. *Zook*, 336 U. S. 725 ..... 18, 33, 40–41, 43, 44
Case v. *Bowles*, 327 U. S. 92 17
Charge to Grand Jury—Treason, 30 Fed. Cas. 1046 15
Clothing Workers v. *Richman Bros.*, 348 U. S. 511 ..... 6, 32
Cloverleaf Co. v. *Patterson*, 315 U. S. 148 ..... 18, 19, 39
Cohens v. *Virginia*, 6 Wheat. 264 ..... 19, 39
De Jonge v. *Oregon*, 299 U. S. 353 12
Dennis v. *United States*, 341 U. S. 494 ..... 4, 12, 16, 24, 31, 47, 48
Fiske v. *Kansas*, 274 U. S. 380 12
Fox v. *Ohio*, 5 How. 410 43
Frankfeld v. *United States*, 198 F. 2d 679, certiorari denied, 344 U. S. 922 31
Garner v. *Los Angeles Board*, 341 U. S. 716 23
General Drivers, Warehousemen, and Helpers v. *American Tobacco Co.*, 348 U. S. 978 19
Gerende v. *Board of Supervisors of Elections of Baltimore*, 341 U. S. 56 22
Gibbons v. *Ogden*, 9 Wheat. 1 ..... 18, 19
Gilbert v. *Minnesota*, 254 U. S. 325 ..... 6, 14, 17, 18, 33–35, 43
Gitlow v. *New York*, 268 U. S. 652 ..... 4, 11, 13, 24, 25, 26, 36, 42, 47
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146 36
Herndon v. *Lowry*, 301 U. S. 242 12
Hill v. *Florida*, 325 U. S. 538 40
Hines v. *Davidowitz*, 312 U. S. 52 ..... 6, 17, 18, 19, 21, 33, 39, 40, 41, 42, 48
Illinois Central Railroad Co. v. *Public Utilities Commission*, 245 U. S. 493 18
Jerome v. *United States*, 318 U. S. 101 29
Kelly v. *Washington*, 302 U. S. 1 ..... 18, 19, 20
Lichter v. *United States*, 334 U. S. 742 48
Luiecke v. *Watkins*, 335 U. S. 160 36
McNiel, Ex parte, 13 Wall. 236 16

Cases—Continued

	Page
Maurer v. *Hamilton*, 309 U. S. 598	18
Mintz v. *Baldwin*, 289 U. S. 346	18
Missouri, Kansas & Texas Railway Co. v. *Haber*, 169 U. S. 613	18
Missouri, Kansas & Texas Railway Co. v. *Harris*, 234 U. S. 412	18
Moore v. *Illinois*, 14 How. 13	38, 43
Napier v. *Atlantic Coast Line*, 272 U. S. 605	18, 19, 39
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111	16
Nelson v. *Wyman*, 99 N. H. 33, 105 A. 2d 756	9, 30
People v. *Lloyd*, 304 Ill. 23	14
People v. *Lynch*, 11 Johns. (N. Y.) 549	15
People v. *Noble*, 68 Cal. App. 2d 853, 158 P. 2d 225	38
Quarrier, Ex parte, 2 W. Va. 569	15
Reid v. *Colorado*, 187 U. S. 137	18, 19
Rice v. *Santa Fe Elevator Corp.*, 331 U. S. 218	18, 19, 20, 33, 38, 40
Rochin v. *California*, 342 U. S. 165	29
Savage v. *Jones*, 225 U. S. 501	18
Sexton v. *California*, 189 U. S. 319	29
Siebold, Ex parte, 100 U. S. 371	43
Signot v. *Davenport*, 22 How. 227	18, 19, 39
Southern Pacific Co. v. *Arizona*, 325 U. S. 761	18
Southern Railway Co. v. *Railroad Commission of Indiana*, 236 U. S. 439	18, 19, 39
State v. *Holm*, 139 Minn. 267	14, 35
State v. *Yachin*, 92 N. J. L. 269, affirmed, 93 N. J. L. 485, writ of error dismissed, 254 U. S. 662	14
Taylor v. *Mississippi*, 319 U. S. 583	12
Townsend v. *Yeomans*, 301 U. S. 441	18
Union Brokerage Co. v. *Jensen*, 322 U. S. 202	18
United States v. *Flynn*, 216 F. 2d 354, certiorari denied, 348 U. S. 909	31
United States v. *Howell Electric Motors Co.*, 78 F. Supp. 627, affirmed, 172 F. 2d 953	27
United States v. *Lanza*, 260 U. S. 377	43

Cases—Continued Page

United States v. *Weigel*, 28 F. 2d 30, petition for certiorari dismissed, 278 U. S. 664 27

United States v. *Marigold*, 9 How. 560 43

United States v. *Mesarosh*, 223 F. 2d 449 31

Weber v. *Anheuser-Busch, Inc.*, 348 U. S. 468 ..... 19, 48

Welch Co. v. *New Hampshire*, 306 U. S. 79 18

Whitney v. *California*, 274 U. S. 357 ..... 4, 12, 13, 24, 36, 37, 47

Yates v. *United States*, decided March 17, 1955 (C. A. 9), pending on petition for certiorari, Nos. 308, 309, 310, O. T. 1955 31

U. S. Constitution:

Art. I, Sec. 8 ..... 16, 34

Art. III, Sec. 3 15

Art. IV, Sec. 2, cl. 2 15

Art. IV, Sec. 4 16

Art. VI 17

Fifth Amendment 43

Federal Statutes:

Act of July 31, 1861, c. 33, 12 Stat. 284 36

Act of May 16, 1918, c. 75, § 1, 40 Stat. 553 36

Alien Registration Act of June 28, 1940, c. 439, 54 Stat. 670:

Title I 40, 50

Title III 40, 50

Criminal Code of 1909, § 6, 35 Stat. 1089 36

Espionage Act of June 15, 1917, c. 30, Title I, § 3, 40 Stat. 217, 219 (now contained in 18 U. S. C. 2388) 33

Joint Resolution of March 3, 1921, c. 136, 41 Stat. 1359 37

Labor-Management Relations Act, 1947, amending § 10 (a) of the National Labor Relations Act (61 Stat. 146), 29 U. S. C. 160 (a) 29

Smith Act of June 28, 1940, c. 439, §§ 2, 3, 5, 54 Stat. 670 (18 U. S. C. 2385) 5, 9, 10, 24, 25, 27, 28, 29, 50

18 U. S. C.:

§ 659 44

§ 660 44

Federal Statutes—Continued Page
§ 1992 44
§ 2117 44
§ 2381 15
§ 2384 36
§ 2388 33
§ 3231 ..... 5, 29
State Statutes:
New York Criminal Anarchy Act (1909) 11, 25
Pennsylvania Act of June 26, 1919, P. L. 639, §§ 1, 2, as amended by the Act of May 10, 1921, P. L. 435, § 1 51
Pennsylvania Sedition Act (§ 207 of Pennsylvania Penal Code of 1939, 18 Purd. Pa. Stat. Ann. 4207) 12, 51
Congressional Materials:
Annual Report of the Committee on Un-American Activities for the Year 1949 (H. Rep. No. 1950, 81st Cong., 2d sess.) 22, 23, 28
84 Cong. Rec. 10452 ..... 26, 27
Hearing before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, 76th Cong., 1st sess., on H. R. 5138, April 12 and 13, 1939 ..... 25, 26
H. R. 5138, 76th Cong 25
H. Rep. No. 994, 76th Cong., 1st sess 26
H. Rep. No. 2683, 76th Cong., 3d sess 26
H. Rep. 2980, 81st Cong., 2d sess., p. 2 28
S. Rep. No. 1154, 76th Cong., 1st sess. 26
S. Rep. No. 1721, 76th Cong., 3d sess 26
S. Rep. No. 1796, 76th Cong., 3d sess 26
Miscellaneous:
Chafee, *Free Speech in the United States* (1941) 47
Department of Justice Press Release, July 18, 1955 31
Digest of the Public Record of Communism in the United States (Fund for the Republic, Jan. 1955) 15, 22, 23, 30, 31
Emerson and Haber, *Political and Civil Rights in the United States* (1952) 22
Gellhorn, *The States and Subversion* (1952) 22, 23, 47

Miscellaneous—Continued

Page

Grant, *The Lanza Rule of Successive Prosecutions*, 32 Col. L. Rev. 1309 (1932) 44

Groner, *State Control of Subversive Activities in the United States*, 9 Fed. Bar J. 61 (1947) 12, 23

Hunt, *Federal Supremacy and State Anti-Subversion Legislation*, 53 Mich. L. Rev. 407 (1955) 47

New York Times, Sept. 15, 1955, p. 19 31

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Note, *State Control of Subversion: A Problem in Federalism*, 66 Harv. L. Rev. 327 (1952) 23

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Prendergast, *State Legislatures and Communism: The Current Scene*, 44 Am. Pol. Sci. Rev. 556 (1950) 22, 23, 47

Report of Maryland State Commission on Subversive Activities (January 1949) (App. J to *Annual Report of the Committee on Un-American Activities for the Year 1949* (H. Rep. No. 1950, 81st Cong., 2d sess.) 22, 23, 28

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 19

COMMONWEALTH OF PENNSYLVANIA, PETITIONER

v.

STEVE NELSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the invitation of the Court to the Solicitor General "to file a brief setting forth the views of the Government" (R. 1421).

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania (R. 50) is reported at 172 Pa. Super. 125, 92 A. 2d 431. The majority (R. 50–64) and dissenting (R. 64–92) opinions in the Supreme Court of Pennsylvania are reported at 377 Pa. 58, 104 A. 2d 133.

359853—55——2

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 25, 1954 (R. 50). A petition for reargument was denied on April 27, 1954. See 377 Pa. 58, 60. The petition for a writ of certiorari was filed on July 24, 1954, and was granted on October 14, 1954 (R. 1421). The jurisdiction of this Court rests upon 28 U. S. C. 1257 (3).

QUESTION PRESENTED

Whether the federal Smith Act, which prohibits the knowing advocacy of the overthrow of established government by force and violence, supersedes or suspends the enforceability of Section 207 of the Pennsylvania Penal Code, which proscribes similar conduct.

STATUTES INVOLVED

The Smith Act (Act of June 28, 1940, c. 439, 54 Stat. 670, 671, 18 U. S. C. 2385) and the Pennsylvania Sedition Act (Section 207 of the Pennsylvania Penal Code of 1939, 18 Purd. Pa. Stat. Ann. 4207) are set forth in the Appendix, *infra*, pp. 50–52.

STATEMENT

The pertinent facts may be summarized as follows: Respondent was charged, in a 12-count indictment (R. 9–20) returned in the Court of Quarter Sessions of the Peace, Allegheny County, Pennsylvania, with twelve violations of the Penn-

sylvania Sedition Act (*infra*, pp. 50–51). The several counts charged different acts of sedition, as therein defined, against the peace and dignity of the Commonwealth of Pennsylvania. Following a trial by jury, respondent was found guilty on all counts and sentenced to imprisonment for 20 years and to pay a fine of $10,000 plus the costs of the prosecution (R. 21). On appeal to the Superior Court of Pennsylvania, the judgment of conviction was affirmed (R. 50), the court adopting the opinion of the trial judge denying motions for a new trial and in arrest of judgment. On appeal to the Supreme Court of Pennsylvania, the judgment of the Superior Court was reversed and the indictment was ordered quashed (R. 50–64), one judge dissenting (R. 64–92). The majority opinion, while it makes reference to various contentions of respondent "which raise serious questions as to whether his conviction resulted from a fair and impartial trial" (R. 52), makes it clear that reversal was predicated solely on the ground that "the Pennsylvania Sedition Act was suspended by operation of law upon the enactment by Congress of Title I of the Act of June 28, 1940, c. 439, 54 Stat. 670, known as the Smith Act, which defines sedition against the United States and prescribes punishments therefor" (R. 53).

SUMMARY OF ARGUMENT

I.

It is settled that a state, as an essential attribute of sovereignty and in the exercise of its police power, may proscribe and punish advocacy of the violent overthrow of organized government, at least in the absence of congressional action to the contrary. *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357. Such advocacy, whether it be directed in terms against the state or federal government, or both, is in fact an assault upon both governments. A state, therefore, has the power to punish acts of sedition committed within the state, whether directed in terms against the state or the federal government.

II.

A. Congress, like the states, has the power to proscribe and punish advocacy of the violent overthrow of organized government (*Dennis* v. *United States*, 341 U. S. 494), which power it exercised in enacting the Smith Act. The threat posed by such advocacy is undoubtedly of paramount importance to the federal government. But to warrant the conclusion that state legislation which is otherwise a valid exercise of the states' police power has been superseded or suspended by the Smith Act, it must be established that the latter is in irreconcilable conflict with the state statute, or the congressional purpose to occupy the entire field exclusively must otherwise clearly appear.

B. The threshold inquiry when an issue of supersedure is raised concerns the available direct evidence as to the congressional purpose. Forty-two states plus Alaska and Hawaii have statutes which prohibit advocacy of the violent overthrow of established government. Most of these statutes have been in existence for many years. All of them would be invalidated, insofar as they prohibit such advocacy, if the view of the majority below were correct. Such congressional nullification of important parts of the basic criminal laws of most of the states requires the clearest sort of showing that such was the purpose of Congress.

The Smith Act itself and its legislative history are barren of any suggestion that supersedure of similar state laws was intended. On the contrary, there is clear evidence that Congress was well aware of the existence of the state legislation and there is no evidence that it intended the Smith Act to affect such legislation. Moreover, the Smith Act is included in the federal Criminal Code as reenacted in 1948, which includes a general saving clause to the effect that nothing in the Code "shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." 18 U. S. C. 3231.

C. In concluding that Congress must have intended to preempt the field, the court below relied heavily on the assumption that enforcement of the Pennsylvania statute would be "hampering

to the exercise of federal power." But this assumption does not accord with federal experience. The administration of the various state laws has not in fact interfered with, embarrassed, or impeded the enforcement of the Smith Act. It should not be assumed by this Court that in the future state laws will be administered with less regard for the paramount federal interest in the prevention of sedition. Cf. *Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 517–519.

D. No other factors are present warranting the conclusion that Congress intended to ban enforcement of state sedition laws. The emphasis of the court below on the fact that the national interest in the control of sedition is obviously paramount is misplaced. While this factor is of significance in resolving problems of supersedure, it does not itself preclude enforcement of state laws on the same subject. *Gilbert* v. *Minnesota*, 254 U. S. 325. Congress might well have contemplated, as we submit it did here, cooperation by the states against the enemies of all.

The fact that statutes proscribing sedition are ordinary criminal statutes and not regulatory in nature eliminates the possibility of conflict from that source. The regulatory character of the statutes involved has been crucial in every case in which this Court has held a state statute to have been superseded by a federal statute. Thus in *Hines* v. *Davidowitz*, 312 U. S. 52, this Court, in

holding that the federal Alien Registration Act superseded a Pennsylvania statute also providing for the registration of aliens, stressed the regulatory character of the legislation and the fact that it operated in a field which affects international relations. In this case, by contrast, there is a total absence of any continuing regulatory purpose beyond the prohibition of the conduct proscribed. Moreover, the field is that of criminal justice, which, in our federal system, is primarily committed to the care of the states. This Court has stressed that it will not lightly infer that Congress, by the mere passage of a federal act, has impaired the traditional sovereignty of the states. *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 749.

It is settled that there is no constitutional obstacle to the punishment by both the states and the United States of the same acts. There can, therefore, be no valid suggestion that the state statutes stand as obstacles to the effective enforcement of the Smith Act on the ground that a state proceeding would bar a subsequent federal prosecution on grounds of double jeopardy. The court below appears, however, to have been influenced by the fact that persons engaging in seditious activities, if prosecuted under the Pennsylvania statute, might, like respondent, receive a sentence longer than the maximum provided by the Smith Act, and, if prosecuted under both state and fed-

eral statutes, might be punished under both. But this is true in all situations where state and federal statutes proscribe the same conduct. And this Court has never held this circumstance to operate as a bar to enforcement of a state statute. A person who engages in seditious activity can, of course, be prosecuted only in those states within the borders of which the seditious acts occur.

III

Much has been written with respect to the wisdom of state sedition laws. Doubts as to the wisdom of such laws or as to the possibility that such legislation may be abused in practice, however, should not be permitted to obscure the fact that within an area, such as this, where both Congress and the states may act, it is for Congress and not the courts to determine, within the constitutional framework, the extent, if any, to which the traditional sovereignty of the states must yield to the paramount federal power. We find no indication, express or by implication, that Congress has at any time considered it in the public interest to displace state sedition laws. If such action should at any time appear to be in the public interest, Congress is free to legislate to that end. The vindication of the public interest poses a legislative problem to be dealt with by Congress.

ARGUMENT

THE SMITH ACT DOES NOT PRECLUDE ENFORCEMENT OF STATE SEDITION STATUTES

The United States is deeply concerned with the effective and appropriate enforcement of laws prohibiting the knowing advocacy of the overthrow by force and violence of established government. It is a concern rooted in the responsibility of the Federal Government to assure the continued vitality of constitutional government as against a real and well organized danger. The federal Smith Act, enacted in 1940, is one statute directed to this objective. Pennsylvania and many other states have similar statutes, some of which date back many years. For convenience of reference, we refer to these laws in this brief as sedition laws.

A majority of the court below held that Congress, when it enacted the Smith Act, banned enforcement of state laws proscribing similar conduct (R. 50–64). The dissenting judge vigorously disagreed (R. 64–92). The Supreme Court of New Hampshire has likewise rejected the decision of the Pennsylvania Supreme Court. *Nelson v. Wyman*, 99 N. H. 33, 105 A. 2d 756, 769–770. There can be no real question as to the paramount interest of the federal government in the prevention of sedition. But the question of supersedure turns on the purpose of Congress. The conclusion of the court below that there had been super-

sedure, as we show *infra*, was grounded on inference alone. The Smith Act itself and available congressional materials are barren of any suggestion that Congress intended the Act to supersede or suspend the enforcement of state sedition laws. The assumption of the court below that enforcement of such state laws would be "hampering to the exercise of federal power" (R. 57) is, moreover, contrary to federal experience. During the 15 years the federal and state sedition laws have existed side by side, enforcement experience has been one of cooperation and not of conflict. This record of cooperation, we submit, negates any inferences based on hypothetical possibility of conflict in the administration of the federal and state laws.

It is the position of the United States that the federal government has a paramount but not exclusive interest in the prevention of sedition; that under our federal system the states have the power to punish acts of sedition committed within their respective jurisdictions; and that Congress has done nothing to limit or suspend the exercise of that power. Accordingly, we conclude that the Pennsylvania Sedition Act has not been superseded by the Smith Act or other federal legislation. Since Congress has not acted in the premises, there is no occasion to explore the

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*The United States takes no position on other issues which may be presented in this case.

constitutional limitations, if any, on the power of Congress to limit or prohibit the enforcement of state statutes prohibiting advocacy of the violent overthrow of established government.

I

AT LEAST IN THE ABSENCE OF CONGRESSIONAL ACTION TO THE CONTRARY, THE STATES HAVE POWER TO PUNISH ACTS OF SEDITION COMMITTED WITHIN THEIR RESPECTIVE JURISDICTIONS

It is settled that a state, as an essential attribute of sovereignty and as part of its fundamental police power, possesses the power to proscribe and punish the advocacy within its borders of the violent overthrow of organized government, at least in the absence of congressional action precluding the exercise of such power. Thus in *Gitlow* v. *New York*, 268 U. S. 652, this Court, in sustaining New York's Criminal Anarchy Act, which, like the Pennsylvania statute here involved, prohibited advocacy of the overthrow of organized government by force and violence, said (268 U. S. at 667–668):

> That a State in the exercise of its police power may punish those who abuse this freedom [of speech and of the press] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. [Citing cases.] * * *
>
> And, for yet more imperative reasons, a State may punish utterances endangering

> the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. * * * And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. [Citing cases.] In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied.

Whitney v. *California*, 274 U. S. 357, 371, sustaining California's Criminal Syndicalism Act, is to the same effect.[2]

The power to punish seditious advocacy reaches all such advocacy as occurs within the criminal jurisdiction of the state. There is no essential difference between the provisions of the Pennsylvania Sedition Act, which punishes advocacy of the overthrow by force of "the government of

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[2] See also *Fiske* v. *Kansas*, 274 U. S. 380; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; and *Taylor* v. *Mississippi*, 319 U. S. 583. In these cases convictions under state criminal syndicalism and similar statutes were set aside as violative of the Fourteenth Amendment, owing to insufficiency of the evidence. None, however, questioned the power of a state to punish advocacy of violent governmental overthrow. See Mr. Justice Frankfurter concurring in *Dennis* v. *United States*, 341 U. S. 494, 536-542; Groner, *State Control of Subversive Activities in the United States* (1947), 9 Fed. Bar Journ. 61, 93-94.

this State or of the United States" (*infra*, p. 51); and the more general provisions of the New York statute upheld in *Gitlow* which speaks of the "overthrow of organized government" (268 U. S. at 654) or the California statute upheld in *Whitney* which speaks of the "use of force to accomplish any political change" (274 U. S. at 260). The provisions of each of these statutes reflect the obvious fact that the advocacy of the overthrow of an established government whether it be directed in terms against the state or federal government, or both, is in fact an assault upon both governments.[a] As the majority below observed (R. 58):

> * * * it is difficult to conceive of an act of sedition against a State in our federated system that is not at once an act of sedition against the Government of the United States—the union of the forty-eight component States.

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[a] The converse, of course, is equally true, *i. e.*, an act of sedition against the United States must necessarily be, from a practical point of view, an act of sedition against the state wherein it is committed. For this reason, it seems to us that the majority below expressed an unrealistic point of view when they said (R. 58):

"And, while the Pennsylvania statute proscribes sedition against either the Government of the United States or the Government of Pennsylvania, it is only alleged sedition against the United States with which the instant case is concerned. Out of all the voluminous testimony, we have not found, nor has anyone pointed to, a single word indicating a seditious act or even utterance directed against the Government of Pennsylvania."

Petitioner was indicted and convicted, it should be noted,

This Court expressed the same thought when it noted, in sustaining a Minnesota statute making it unlawful to advocate that men should not enlist in the armed forces of the United States or the State of Minnesota, that "this country is one composed of many and must on occasions be animated as one", and added that "the constituted and constituting sovereignties must have power of cooperation against the enemies of all." *Gilbert* v. *Minnesota*, 254 U. S. 325, 329. "* * * the State is not inhibited from making 'the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.'" *Id.* at 331. See also *Albertson* v. *Millard*, 106 F. Supp. 635, 641 (E. D. Mich.), reversed on other grounds, 345 U. S. 242; *State* v. *Holm*, 139 Minn. 267, 273; *People* v. *Lloyd*, 304 Ill. 23, 34; *State* v. *Tachin*, 92 N. J. L. 269, 271–272, affirmed, 93 N. J. L. 485, writ of error dismissed, 254 U. S. 662.

The nature of acts of sedition as assaults on both the state and federal governments is illustrated by analogy to treason, which like sedition is concerned with the forcible overthrow of the established government. The Constitution itself

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of advocating by prescribed means the overthrow by force of "the Government of the State of Pennsylvania and of the United States * * * against the peace and dignity of the Commonwealth of Pennsylvania" (R. 12).

recognizes that treason may be a state as well as a federal crime. See Article III, Section 3; and Article IV, Section 2, Clause 2. Treason, like sedition, has in fact been made a crime under federal statute (18 U. S. C. 2381). Every state has made provisions for treason either in its constitution or statutes, often in both. Most of these provisions closely follow Article III, Section 3, of the United States Constitution, which defines the crime as levying war against the United States or adhering to its enemies. State provisions speak of war against the state, and some include war against the United States as well. See *Digest of the Public Record of Communism in the United States* (Fund for the Republic, 1955), pp. 241–249. The meager authorities which have dealt with the question, moreover, are in agreement that the same act of treason may constitute a crime against both state and federal governments. *Charge to Grand Jury—Treason*, 30 Fed. Case No. 18,275, 30 Fed. Cas. 1046, 1047 (C. C., D. R. I., 1842); *Ex parte Quarrier*, 2 W. Va. 569, 572 (1866); cf. *People v. Lynch*, 11 Johns. (N. Y.) 549 (1814).

We conclude that, at least in the absence of congressional action to the contrary, a state has the power to punish sedition and that acts of sedition committed within the state, whether directed in terms against the state or against the United States, are within the scope of that power. It remains to consider whether, as held

by the court below, Congress has acted so as to preclude the enforcement of such a state statute.

II

CONGRESS HAS NOT PREEMPTED THE FIELD OF PUNISHING SEDITIOUS ACTIVITIES

Congress, like the states, has the power to proscribe and punish advocacy of the violent overthrow of organized government. *Dennis* v. *United States*, 341 U. S. 494. It would seem obvious, as the court below noted, that the threat posed by such advocacy is of "paramount importance to the Federal Government" (R. 57). The Constitution itself empowers Congress to "provide for the common Defence and general Welfare of the United States" (Art. I, Sec. 8), and charges the federal government with the duty of "guarantee[ing] to every State in this Union a Republican Form of Government." Art. IV, Sec. 4. We think it clear, moreover, that the problem of sedition as it was understood at the time the Smith Act was enacted and as it exists today is "a national problem" which calls for a solution "on a national scale." Cf. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 123. This case, therefore, poses a problem involving "the complex system of polity" (*Ex parte McNiel*, 13 Wall. 236, 240) within our federal system, in an area where the "national interest is obviously paramount" (R. 57). Where

state and valid federal legislation conflict, the latter, of course, prevails as "the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Constitution, Art. VI.

A. THE CONCLUSION THAT THE EXERCISE OF STATE POLICE POWERS HAS BEEN SUSPENDED IS WARRANTED ONLY WHERE THE CONGRESSIONAL PURPOSE TO EFFECT THAT RESULT IS CLEARLY MANIFESTED

The question whether a state statute which is otherwise a valid exercise of the state's police power has been suspended, superseded, or displaced by a federal statute, enacted pursuant to the paramount power of Congress over the subject matter under the Constitution, has been before this Court many times. Usually, though not invariably,* the basis of the assertion of the superior federal authority has been the commerce clause. Each decision has of course turned on the particular provisions of the statutes involved and the facts of the case, but the broad governing principle is clear: To warrant the holding that state legislation which is otherwise a valid exercise of the state's police power has been superseded or suspended by an act of Congress deal-

* See, *e. g.*, *Hines* v. *Davidowitz*, 312 U. S. 52, discussed *infra*, p. 40 (control over aliens under the foreign relations and immigration powers); *Gilbert* v. *Minnesota*, 254 U. S. 325, discussed *infra*, pp. 33-36 (control over recruiting activities of the armed forces of the United States under war powers); and *Case* v. *Bowles*, 327 U. S. 92 (price control legislation under war powers).

ing with the same subject matter, the congressional act must be in irreconcilable conflict with the state act, or the congressional intent to occupy the entire field exclusively must otherwise clearly appear. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Missouri, Kansas & Texas Railway Co.* v. *Haber*, 169 U. S. 613, 623; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Savage* v. *Jones*, 225 U. S. 501, 533; *Missouri, Kansas & Texas Railway Co.* v. *Harris*, 234 U. S. 412, 418–419; *Southern Railway Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439, 447–448; *Illinois Central Railroad Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510; *Gilbert* v. *Minnesota*, 254 U. S. 325, 328–330; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 610–611; *Mintz* v. *Baldwin*, 289 U. S. 346, 350; *Townsend* v. *Yeomans*, 301 U. S. 441, 454; *Kelly* v. *Washington*, 302 U. S. 1, 9–10; *Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85; *Maurer* v. *Hamilton*, 309 U. S. 598, 614; *Hines* v. *Davidowitz*, 312 U. S. 52, 66–68; *Cloverleaf Co.* v. *Patterson*, 315 U. S. 148, 157 (and see dissenting opinion, p. 170); *Allen-Bradley Local* v. *Board*, 315 U. S. 740, 749–750; *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230–231; *Auto Workers* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 252, 253; *California* v. *Zook*, 336 U. S. 725, 733;

Weber v. *Anheuser-Busch, Inc.*, 348 U. S. 468, and cases under the Wagner Act and Taft-Hartley Act, cited at pp. 474–477; *General Drivers, Warehousemen, and Helpers* v. *American Tobacco Co.*, 348 U. S. 978. *Cf. Cohens* v. *Virginia*, 6 Wheat. 264. A typical statement of the pertinent principle is the following from *Reid* v. *Colorado*, 187 U. S. at 148:

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. 'This court has said—and the principle has been often reaffirmed—that "in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot* v. *Davenport*, 22 How. 227, 243.

Where the express provisions of the state and federal statutes are in direct conflict, there is, of course, no problem—the state legislation is necessarily superseded. *Kelly* v. *Washington*, 302

Of the cases cited, *Gibbons*, *Sinnot*, *Southern Railway*, *Napier*, *Hines*, *Oxweld*, *Reid*, *Weber* (and nine cases under the Wagner Act or Taft-Hartley Act cited therein), and *General Drivers* held that the state law in question had been superseded; the state laws involved were upheld in the remaining cases.

U. S. at 9. Similarly, there is no problem where "the subject is one demanding uniformity of regulation" throughout the country; in such a case "state action is altogether inadmissible" even "in the absence of federal action." *Ibid.* The problem typically arises in "those cases where States may act in the absence of federal action but where there has been Federal action governing the same subject." *Ibid.* In all cases the ultimate problem is that of ascertaining the purpose of Congress. But, while the congressional purpose to suspend or displace state legislation must be clear to warrant the holding that that result has been accomplished, such purpose need not be expressly spelled out in the federal statute. In the following excerpt from *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. at 230–231, this Court summarized the more important factors to be considered in determining the congressional purpose:

> Congress legislated here in a field which the States have traditionally occupied. [Citing cases.] So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. [Citing cases.] Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. [Citing cases.] Or the Act of Congress

> may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz*, 312 U. S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. [Citing cases.] Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill* v. *Florida*, 325 U. S. 538. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide. [Citing cases.]

And in *Hines* v. *Davidowitz*, 312 U. S. 52, 67, this Court stated that the question of whether Congress intended the federal Alien Registration Act to supersede a Pennsylvania statute dealing with the same subject was in essence the question of "whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

B. THE AVAILABLE DIRECT EVIDENCE INDICATES THAT CONGRESS INTENDED TO LEAVE STATE LEGISLATION UNAFFECTED BY THE SMITH ACT.

The threshhold inquiry when an issue of supersedure is raised concerns the available direct evidence as to the intent of Congress.

Pennsylvania's Sedition Act is, of course, by no means unique. As of January 1955, some 30 states plus Alaska and Hawaii had sedition laws on their statute books, and 12 others had either criminal syndicalism or criminal anarchy statutes or both, making a total of 42 states plus Alaska and Hawaii which had criminal legislation in this general field.[6] The statutory line of distinction between these different offenses—sedition, criminal syndicalism and criminal anarchy—is in many instances so fine that the offenses are, in the language of the Maryland State Commission on Subversive Activities, "almost indistinguishable."[7] There is of course considerable variation in the phraseology of the statutes, but the practical effect of each is, as the Maryland report states, "very similar," *viz*, "to penalize the advocacy in any manner of the overthrow of the government of the United States or of the state

[6] The various state statutes are classified and digested in *Digest of the Public Record of Communism in the United States* (Fund for the Republic, Jan. 1955), pp. 266–306. See also Gellhorn, *The States and Subversion* (1952), Appendices A and B; Emerson and Haber, *Political and Civil Rights in the United States* (1952), p. 463; Prendergast, *State Legislatures and Communism: The Current Scene* (1950), 44 Am. Pol. Sci. Rev. 556; Groner, *State Control of Subversive Activities in the United States* (1947), 9 Fed. Bar J. 61, 75–85.

[7] Report of the Maryland State Commission on Subversive Activities, January 1949, pertinent excerpts from which are incorporated as Appendix I (pp. 25–46) to the *Annual Report of the Committee on Un-American Activities for the Year 1949* (H. Rep. No. 1950, 81st Cong., 2d sess.). The quoted language from the Maryland report appears at p. 26.

by force and violence, or by other unlawful means." The great majority of these statutes had been in existence for many years prior to the enactment in 1940 of the Smith Act, most of them dating, like the Pennsylvania act here in issue, from the period of or immediately following World War I.[8] All these statutes, as pointed out in the dissenting opinion below (R. 72), have been superseded and in effect invalidated by the Smith Act if the view of the majority below is correct.[9] This result—congressional nullification of important parts of the basic criminal laws of most of the states—obviously requires the clearest

[8] See *Annual Report of the Committee on Un-American Activities for the Year 1949* (H. Rep. No. 1950, 81st Cong., 2d Sess.), p. 26.

[9] *Id.*, pp. 33–44.

[10] Furthermore, if the states are precluded from enforcing their antisedition *criminal* laws, the question arises as to how effectively they can enforce their antisedition *civil* laws. (Cf. *Gerende* v. *Board of Supervisors of Elections of Baltimore*, 341 U. S. 56; *Garner* v. *Los Angeles Board*, 341 U. S. 716; *Adler* v. *Board of Education of the City of New York*, 342 U. S. 485). These laws are collected, classified and digested in *Digest of the Public Record of Communism in the United States* (Fund for the Republic, Jan. 1955), pp. 324–434. For example, as pointed out in the dissenting opinion below at R. 72, many states now have laws which expressly or in effect deny state employment to persons who teach or advocate or are members of organizations which teach or advocate the overthrow of government by force and violence. See also Note, *State Control of Subversion: A Problem in Federalism* (1952), 66 Harv. L. Rev. 327, 328; Pfeffergast, *State Legislatures and Communism: The Current Scene* (1950), 44 Am. Pol. Sci. Rev. 556, 556–557, 561–564, 570–571; Goldborn, *The States and Subversion* (1952), Appendix A and B.

of showings that such was the purpose of Congress in enacting the Smith Act.

We find no evidence that Congress intended to accomplish so drastic a result.[21] On the contrary, the available direct evidence strongly indicates that Congress intended to leave state legislation unaffected.

We start with the text of the Smith Act itself (*infra*, pp. 50–51). Certainly there is nothing in the language of the Act indicative of an intent on the part of Congress to preempt the field of punishing seditious activities to the exclusion of the states. Nor does any other federal legislation dealing with the control of Communism provide that Communist control measures shall be the exclusive responsibility of the federal government. A congressional purpose to preempt the field, if there be such, must therefore be found other than in the terms of the Smith Act or related federal legislation.

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[21] In *Dennis* v. *United States*, 341 U. S. 494, sustaining the constitutionality of the Smith Act as there applied, the several opinions discussed at length the Court's earlier *Gitlow* and *Whitney* decisions (see pp. 11–12, *supra*) and the state statutes involved in those cases, (see 341 U. S. at 505–507, 510, 513, 515, 536–537, 538, 541–542, 543, 545, 562 (fn. 2), 567 (fn. 10), 568 (fn. 12); 585–586, 592), and the close similarity between the Smith Act and the state statutes there involved was noted (see, *e. g.*, 341 U. S. at 536, 562 fn. 2). Yet (and the point is not without significance) it is nowhere suggested in any of the *Dennis* opinions that such state statutes may have been superseded or suspended by the Smith Act.

We have examined the legislative history of the Smith Act and find nothing that indicates in any way a congressional purpose to supersede or suspend state sedition laws. The Smith Act had its origin in H. R. 5138, 76th Congress. Nothing in the legislative history of that bill evidences any congressional intent to preempt the field. On the contrary, there is a clear showing in that history that Congress was well aware of the existence of state legislation in this field and there is no evidence that it intended the Smith Act to affect such legislation.

For example, in the hearings before a subcommittee of the House Judiciary Committee on H. R. 5138, repeated references were made to state legislation similar to that covered by the pertinent provisions of the federal bill, but no one indicated that such state legislation would be affected in any way by the bill.[1] One of the witnesses who appeared in support of the legislation referred to the fact that New York's Criminal Anarchy statute, which served as the model for the Smith Act, had been upheld in

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[1] Hearings before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, on H. R. 5138, 76th Cong., 1st Sess., pp. 7, 69, 82-85.

See *Gitlow* v. *New York*, 268 U. S. at 654-655, for the terms of the New York act; and Hearings before Subcommittee No. 3, *supra*, p. 17 for the original text of H. R. 5138.

this Court's decision in *Gitlow v. New York*, 268 U. S. 652. While several members of the subcommittee as well as the author of the bill, Representative Smith of Virginia, who participated in the hearings as sponsor of the proposed legislation, all evidenced their particular interest in this fact, no one intimated that either the New York Act or other similar state legislation would be superseded, invalidated, or in any wise affected by the enactment of the federal bill.[9]

The committee reports submitted to the House and Senate on this legislation are equally bare of any indication that the bill, if enacted, would displace state laws.[10]

The congressional debates, like the hearings which preceded them, contain references to the similar state laws and the decisions of this Court upholding such legislation.[11] But the Congressional Record may be searched in vain for any indication that anyone in either house thought that enactment of the federal legislation would affect in any way the power of the states to proscribe advocacy of the overthrow of established

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[9] See Hearings before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, on H. R. 5138, 76th Cong., 1st Sess., pp. 83-85.

[10] See H. Rep. No. 994, 76th Cong., 1st sess.; S. Rep. No. 1154, 76th Cong., 1st sess.; S. Rep. No. 1721, 76th Cong., 3d sess.; S. Rep. No. 1796, 76th Cong., 3d sess.; and H. Rep. No. 2683, 76th Cong., 3d. sess. (Conf. report).

[11] See, e. g., 84 Cong. Rec. 10452.

government by force. Indeed, Congressman Smith, the sponsor of the bill, affirmatively stated, in answer to a question as to the relationship between the penalties provided in the proposed law and those provided under the various state laws, that the proposed legislation "has nothing to do with State laws." 84 Cong. Rec. 10452. Congressman Smith has since made even more explicit his personal understanding that the Smith Act did not and was not intended to supersede state sedition laws. He has stated that the opinion of the court below in the instant case was "the first intimation I have ever had, either in the preparation of the act, in the hearings before the Judiciary Committee, in the debates in the House, or in any subsequent development, that Congress ever had the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign states to pursue also their own prosecutions for subversive activities" (see R. 75–76).[17]

The Smith Act became law in 1940. Since that date, both the federal and state governments have

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[17] It should be noted that Representative Smith is not simply giving an *ex post facto* interpretation of the Act. He is calling attention to the *fact* that at no time during the consideration of the legislation was it ever suggested to him, the sponsor of the bill, that state sedition legislation would be superseded. Cf. *United States* v. *Howell Electric Motors Co.*, 78 F. Supp. 627 (E. D. Mich.), affirmed, 172 F. 2d 953 (C. A. 6); *United States* v. *Wheeler*, 28 F. 2d 30, 32 (C. A. 3), petition for certiorari dismissed, 278 U. S. 664.

assumed that the state statutes were operative. An agency of Congress itself has affirmatively noted the continuing existence of state legislation proscribing advocacy of the overthrow of the government by force. In a report issued in March 1950, the House Committee on Un-American Activities noted that since January 1940, "various state legislatures have shown increasing concern with the problem of Communism" and appended to the report a digest, which had been prepared by the Maryland State Commission on Subversive Activities, of all then existing national and state laws dealing with control of subversives, including the Smith Act and the Pennsylvania statute in issue here. *Annual Report of the Committee on Un-American Activities for the Year 1949*, H. Rep. 1950, 81st Cong., 2d sess., pp. 25–46. Again in August 1950, in the report accompanying H. R. 9490, which became the Internal Security Act of 1950 (Act of September 23, 1950, c. 1024, 64 Stat. 987), the House Committee on Un-American Activities reiterated the fact that: "Concern over the Communist threat has not been overlooked by the different State legislatures," and reported that at "the present time * * * 12 States have criminal anarchy laws; 16 have criminal syndicalism laws; 22 have sedition laws; * * *." H. Rep. 2980, 81st Cong., 2d sess., p. 2. Certainly the House Committee on Un-American Activities, which issued the report quoted, would have been

surprised to learn that the state laws proscribing advocacy of the overthrow of the government by force, about which it had informed the House, had been nullities since 1940, when Congress enacted the Smith Act.

Finally, and more generally, the Smith Act is included in the federal Criminal Code as reenacted in 1948 (18 U. S. C. 2385). Like most criminal statutes, it prohibits entirely certain defined conduct; it is not a regulatory statute like the Interstate Commerce Act, the National Labor Relations Act, or the Taft-Hartley Act. It falls within the field of criminal justice, the administration of which, in our federal system "is predominantly committed to the care of the States." See *Rochin* v. *California*, 342 U. S. 165, 168; *Jerome* v. *United States*, 318 U. S. 101. In recognition of this predominant interest of the states, Congress included in the Criminal Code a general saving clause which provides that "Nothing in this title [the Criminal Code] shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." 18 U. S. C. 3231. See *Sexton* v. *California*, 189 U. S. 319, 324–325. Thus not only did Congress in the Smith Act fail to hint that it intended to preempt the field of legislation against advocacy of the overthrow of government by force, as it well knew how to do,[18] but it included the Act in the Criminal

[18] Cf., *e. g.*, Sec. 10 (a) of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 1947 (61 Stat. 146), 29 U. S. C. 160 (a).

Code in which it explicitly sought to protect state legislation against supersedure by inference.

C. FEDERAL ENFORCEMENT EXPERIENCE HAS BEEN THAT THE STATE SEDITION LAWS, AS ADMINISTERED BY THE STATES, DO NOT STAND AS OBSTACLES TO THE ACCOMPLISHMENT OF THE FULL PURPOSES AND OBJECTIVES OF THE SMITH ACT.

In concluding that Congress, in enacting the Smith Act, must have intended to preempt the field, the court below relied heavily on its assumption that enforcement of the state statutes would be "hampering to the exercise of federal power" (R. 57). It thought that arrests by state enforcement officers "could readily impair and even thwart the Federal Government's contemporaneous investigation of the alleged offenders," particularly where offenders in any one state were "part of a larger group spread over a number of States" (*ibid*). But this assumption of the Pennsylvania court does not accord with federal experience.

The administration of the various state laws has not, in the course of the fifteen years that the federal and state sedition laws have existed side by side, in fact interfered with, embarrassed, or impeded the enforcement of the Smith Act.[19] The

[19] While there have been a number of state investigations into the problem of control of seditious activities (see, *e. g.*, *Nelson* v. *Wyman*, 99 N. H. 33, 105 A. 2d 756), so far as we know there have in recent years been prosecutions only in Pennsylvania and Massachusetts. See *Digest of the Public Record of Communism in the United States* (Fund for the Republic, Jan. 1955) pp. 266, 306. This may well reflect regard by the states for federal activity in the field. See p. 31, n. 20, *infra*.

significance of this absence of conflict in administration or enforcement of the federal and state sedition laws will be appreciated when it is realized that this period has included the stress of wartime security requirements and the federal investigation and prosecution under the Smith Act of the principal national and regional Communist leaders.[20] Moreover the problem of subversion, as we think Congress recognized, is of such magnitude as to invite federal-state cooperation in the enforcement of their respective sedition laws. Thus the Attorney General of the United States recently informed the attorneys general of the several states in this connection that a full measure of federal-state cooperation would be in the public interest. See *New York Times*, Sept. 15, 1955, p. 19.

[20] As of June 30, 1955, 131 Communist party leaders had been arrested on Smith Act charges, and 90 (two of whom have been granted new trials) had been convicted in federal court. See Department of Justice Press Release, July 18, 1955. The principal cases include *Dennis* v. *United States*, 341 U. S. 494 (members of National Board of Communist Party); *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909 (New York area); *Frankfeld* v. *United States*, 198 F. 2d 679 (C. A. 4), certiorari denied, 344 U. S. 922 (Baltimore-Washington area); *Yates* v. *United States*, decided March 17, 1955 (C. A. 9), pending on petition for certiorari, Nos. 308, 309, 310, O. T. 1955 (Los Angeles area); *United States* v. *Mesarosh*, 223 F. 2d 449 (C. A. 3) (Pittsburgh area). Other prosecutions have been concluded or are pending in Seattle, Detroit, St. Louis, Philadelphia, Cleveland, Connecticut, Puerto Rico, and Hawaii. See *Digest of the Public Record of Communism in the United States* (Fund for the Republic, Jan. 1955), pp. 195–205.

These practical considerations fortify the position of the United States as *amicus curiae* in this litigation. We have shown that there is no suggestion in the legislative history of the Smith Act that Congress deemed that the concurrent enforcement of state sedition statutes would interfere with the effective enforcement of the federal act. Federal enforcement experience confirms the view that the state sedition laws, as administered by the states, do not stand as obstacles to the accomplishment of the full purposes and objectives of the Smith Act. It should not be assumed by this Court that in the future the state laws will be administered with less regard for the paramount federal interest in the prevention of sedition. Cf. *Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 517–519. Hypothetical suggestions as to the possibility of conflict should the state laws not be responsibly administered should have no part in the Court's decision in this case.

D. NO OTHER FACTORS SUPPORT THE INFERENCE THAT CONGRESS INTENDED TO BAN ENFORCEMENT OF STATE SEDITION LAWS

1. *The fact that the acts proscribed fall within a field of predominant federal interest does not of itself render the state statutes unenforceable*

The court below seems also to have assumed that because Congress legislated in a field where the "national interest is obviously paramount" "[i]t follows necessarily that the Federal Govern-

ment's control of the field must be exclusive if it is to protect itself effectively and completely. And that means no sharing of the jurisdiction with the States" (R. 57). The nature of the federal interest in the subject matter is, of course, of significance in resolving problems of supersedure. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230–231; *Hines* v. *Davidowitz*, 312 U. S. 52; *California* v. *Zook*, 336 U. S. 725. But it is equally clear that the dominant federal interest in the prevention of sedition does not itself preclude enforcement of state laws on the same subject. Congress might well have contemplated, as we submit it did here, cooperation by the states against the enemies of all.

This is settled by this Court's decision in *Gilbert* v. *Minnesota*, 254 U. S. 325. The Court there upheld a state statute which made it unlawful for any person to teach or advocate that "men should not enlist in the military or naval forces of the United States or the state of Minnesota" or that "the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States" (*id.* at 326–327). The Federal Espionage Act of June 15, 1917, proscribed substantially the same types of activity as did the Minnesota statute.[23]

[23] Section 3, Title I, of the Espionage Act, c. 30, 40 Stat. 217, 219 (now contained in 18 U. S. C. 2388), provided for the punishment of "whoever, when the United States is at

There was no question as to the predominant federal interest in the subject matter. Indeed much of this Court's opinion dealt with the question whether the constitutional delegation of power to Congress to "provide for the common Defence," "declare War," and "raise and support Armies" (Art. I, Sec. 8) vested in the federal government all power of legislation regarding the subject matter. But the Court held that the predominant federal interest in raising and maintaining armies did not preclude cooperation by the states (254 U. S. at 328–329):

> Undoubtedly, the United States can declare war and it, not the States, has the power to raise and maintain armies. But there are other considerations. The United States is composed of the States, the States are constituted of the citizens of the United States, who also are citizens of the States, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the States as well as the United States are intimately concerned. * * *

From the contention that state legislation of the type under review "encroaches upon or usurps

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war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States."

any power of Congress," the Court continued, "there is an instinctive and immediate revolt" (*id.* at 329):

> * * * Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties and resistance in each to any cooperation from the other, but there is opposing demonstration in the fact that this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all.

And notwithstanding the predominant federal interest which it recognized, this Court rejected the further argument that the federal Espionage Act, because it proscribed the same conduct, had abrogated or superseded the Minnesota statute. In so doing, the Court cited with approval *State v. Holm*, 139 Minn. 267, where, in the words of this Court (254 U. S. at 329–330):

> * * * after a full discussion, the contention was rejected that the Espionage Law of June 15, 1917, abrogated or superseded the [Minnesota] statute, the court declaring that the fact that the citizens of the State are also citizens of the United States and owe a duty to the Nation, does not absolve them from duty to the State nor preclude a State from enforcing such duty. "The same act," it was said, "may

be an offense or transgression of the laws of both Nation and State, and both may punish it without a conflict of their sovereignties.

This principle seems to have been so well settled that the Court found it unnecessary, when it later upheld the New York and California statutes prohibiting advocacy of the overthrow of government by force, even to consider the effect, if any, of the federal seditious conspiracy statute which antedated both state laws [22] or of the federal sedition statute of May 16, 1918.[23] *Gitlow* v. *New*

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[22] The federal seditious conspiracy statute dates from 1861 and punishes, *inter alia*, conspiracy "to overthrow, or to put down, or to destroy by force, the Government of the United States." Act of July 31, 1861, c. 33, 12 Stat. 284; Criminal Code of 1909, Sec. 6, 35 Stat. 1089; now 18 U. S. C. 2384.

[23] The federal sedition statute of May 16, 1918, c. 75, § 1, 40 Stat. 553 (referred to by the majority below as the "Sedition Act of 1918" (R. 62)), made it an offense "when the United States is at war," *inter alia*, to "wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States * * * or * * * any language intended to incite, provoke, or encourage resistance to the United States" or to "willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated. * * *" This statute was in effect on July 5, 1919, and November 28, 1919, when the utterances charged to be violations of the New York and California sedition statutes, respectively, were alleged to have been made. See Transcript of Record, page 3, *Gitlow* v. *New York*, 268 U. S. 652; Transcript of Record, page 15, *Whitney* v. *California*, 274 U. S. 357. In 1919, the United States was still "at war," notwithstanding the armistice of November 11, 1918. See *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Ludecke* v. *Watkins*, 335 U. S.

York, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357.

It would appear, therefore, that the emphasis of the court below on the paramount interest of the federal government in the prevention of sedition is misplaced. The dominant federal interest endows Congress with the power to assume exclusive jurisdiction over the proscription and punishment of sedition threatening the nation, at least to the extent of protecting the federal program against all obstacles to the accomplishment of the full purposes and objectives of Congress. But it throws little light on the crucial question whether Congress in the Smith Act has in fact sought to assume such exclusive jurisdiction.

2. The statutes in question not being regulatory in nature, there is no possibility of conflict from that source.

In considering the question whether Congress intended to preclude enforcement of state sedition statutes, it is important to examine the nature of those statutes. In this brief, we are considering the question of supersedure only with respect to statutes prohibiting advocacy of

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160, 167-170. The "Sedition Act of 1918" was repealed by the Joint Resolution of March 3, 1921, c. 156, 41 Stat. 1359. The majority below notes (R. 62) that the Act was no longer in effect "when the *Gitlow* and *Whitney* cases were before the Supreme Court." While this is true, it would seem immaterial, for, if there had been supersedure while the federal sedition statute remained in effect, the indictments concerned would not have charged violations of law.

the violent overthrow of established government." These are ordinary criminal statutes which proscribe completely, as substantive evils, certain types of conduct and create a substantive crime independently of any administrative or statutory regulation. In this respect they are like statutes punishing murder, robbery or kidnapping, which are crimes against both state and nation wherever elements giving rise to federal jurisdiction are present. *E. g., Moore* v. *Illinois*, 14 How. 13, 20; cases cited at page 43, *infra*. The statutes of the type in issue do not contemplate any scheme of regulation. They do not establish any administrative agency with power to issue rules, orders, or regulations. They are not registration statutes, with attendant administrative requirements. There is therefore no possibility of conflict between the requirements of federal and state administrative regulations stemming from these statutes.

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[1] Different problems arise with respect to state statutes requiring the registration of foreign agents or communists, the labelling of literature, etc. See, *e. g., Albertson* v. *Millard*, 106 F. Supp. 635 (E. D. Mich.), reversed on other grounds, 345 U. S. 242; *People* v. *Noble*, 68 Cal. App. 2d 853, 892, 158 P. 2d 225, 246. "It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230–231. We do not intend to suggest herein that state communist registration statutes have not been superseded by federal communist control legislation.

The state sedition laws are ordinary penal laws which have as their object the protection of the established government of the state. "To interfere with the penal laws of a state, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country," Chief Justice Marshall cautioned, "is a very serious measure, which congress cannot be supposed to adopt lightly or inconsiderately. * * * It would be taken deliberately, and the intention would be clearly and unequivocally expressed." *Cohens* v. *Virginia*, 6 Wheat. 264, 443. Indeed we know of no instance where this court has held a state criminal statute directed at substantive evils, separate and apart from any purpose of regulation, to have been superseded by a federal statute.

The cases where the Court has found federal preemption to have taken place have all involved situations where the state statute was one of a regulatory nature which in some way clashed with a federal regulatory statute—either with specific provisions of the statute or with the congressional policy and purpose that the federal statute alone should provide for the regulation of the subject in question. *See, e. g., Sinnot* v. *Davenport*, 22 How. 227; *Southern Railway Co.* v. *Railroad Commission of Indiana*, 236 U. S. 439; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605; *Hines* v. *Davidowitz*, 312 U. S. 52; *Cloverleaf Co.* v. *Pat-*

Iverson, 315 U. S. 148; *Hill* v. *Florida*, 325 U. S. 538; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218.

In *Hines* v. *Davidowitz*, 312 U. S. 52, heavily relied on by the court below (R. 56, 61), this Court had before it a federal statute[*] setting up a "single integrated and all-embracing system" for the registration of aliens (312 U. S. at 74). Moreover, the system operated "in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority" (312 U. S. at 68). In holding that this statute superseded and rendered unenforceable a Pennsylvania statute also providing for the registration of aliens which established overlapping but not conflicting requirements (see *id.* at 78), this Court stressed the regulatory character of the legislation. See *id.* at 61, 62, 66–68, 70, 74. In the instant case, by contrast, there is a total absence of any regulatory purpose beyond the prohibition of the conduct proscribed.[**]

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[*] The Alien Registration Act (Act of June 28, 1940, c. 439, 54 Stat. 670), Title III. The fact that the "Smith Act" was contained in Title I of the same act is without significance.

[**] In *California* v. *Zook*, 336 U. S. 725, the Court, dividing 5–4, affirmed the conviction of an operator of a travel bureau arranging "share expense" transportation in automobiles under a California statute prohibiting the sale of transportation over the public highways of the state where

The nature of this Court's decision in *Hines* was examined in *Allen-Bradley Local* v. *Board*, 315 U. S. 740. There the Court considered whether the enactment of the National Labor Relations Act, without more, precluded the enforcement of a Wisconsin statute regulating picketing in connection with labor disputes. In holding that the federal act did not preclude the sort of state regulations there involved, the Court said (*id.* at 749):

> "* * * this Court has long insisted that an 'intention of Congress to exclude States from exercising their police power must be clearly manifested.' * * * In the *Hines* case, a federal system of alien registration

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the transporting carrier had no permit from the Interstate Commerce Commission. The majority, stressing the state's interest in dealing with "a real danger to its residents" and the state's "normal power to enforce safety and good-faith requirements for the use of its own highways" (*id.* at 757), held the state statute not in conflict with national policy.

The dissenters stressed the regulatory character of the federal and state legislation as giving rise to conflicts and the fact that Congress had entered the field only after a series of legislative, administrative, and judicial proceedings had shown state regulation of such travel to be highly unsatisfactory (*id.* at 767-773). Under the circumstances, they were unwilling to infer a purpose on the part of Congress to share its exclusive regulatory jurisdiction over this form of interstate transportation with the states (*id.* at 773-776). The absence of a regulatory purpose or any indication that Congress had found that state solution laws impinged on the federal authority precludes a similar approach to the question of preemption in the instant case.

> was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, any "concurrent state power that may exist is restricted to the narrowest of limits." P. 68. Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. * * * Here, we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard.

For the same reasons, the *Hines* case is hardly a precedent for the proposition underlying the decision below that the mere passage of the Smith Act impaired the traditional sovereignty of Pennsylvania by depriving it of legislation deriving from the state's "primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied." *Gitlow v. New York*, 268 U. S. 652, 668.

3. *The fact that persons engaging in seditious activities are subject to punishment under both federal and state statutes does not in itself give rise to an inference that Congress intended to suspend the operation of the state statutes.*

It has long been settled that it is not double jeopardy within the meaning of the Fifth Amendment for both a state and the United States to punish the same act where each of the distinct sovereignties has a legitimate interest to be vindicated. *Fox* v. *Ohio*, 5 How. 410; *United States* v. *Marigold*, 9 How. 560, 569; *Moore* v. *Illinois*, 14 How. 13, 19–20; *Ex parte Siebold*, 100 U. S. 371, 389–394; *Gilbert* v. *Minnesota*, 254 U. S. 325, 329–330; *United States* v. *Lanza*, 260 U. S. 377, 382; *California* v. *Zook*, 336 U. S. 725, 731. The same act, as this Court pointed out in *Gilbert* v. *Minnesota*, 254 U. S. at 330, may be an offense against both a state and the nation, "and both may punish it without a conflict of their sovereignties." There can therefore be no valid suggestion that the state statutes stand as obstacles to the effective enforcement of the Smith Act on the ground that a state proceeding would bar a subsequent federal prosecution on grounds of double jeopardy.

The majority below, however, appear to have been influenced by the fact that persons engaging in seditious activities, if prosecuted under the Pennsylvania statute, might, like respondent, receive a sentence longer than the maximum

provided by the Smith Act, and if prosecuted under both state and federal statutes, might be punished under both." "The difference in the penalties," the court remarked, "strongly argues that it was not the congressional purpose that, after enactment of the Smith Act, conflicting or disparate state statutes on the same subject should be called into play for the punishment of sedition against the United States" (R. 59). Cf. Mr. Justice Frankfurter dissenting in *California v. Zook*, 336 U. S. 725, 738–740. But in most cases where state and federal statutes proscribe the same conduct, the offender is subject to different or cumulative punishments depending upon the statute or statutes under which he is prosecuted,[27] and this Court has never held this

[27] Title 18 of the United States Code contains many examples of offenses made punishable by the United States which are also punishable by the state in which they occur. Some of these are collected in *California v. Zook*, 336 U. S. at 732. See also Grant, *The Lanza Rule of Successive Prosecutions* (1932), 32 Col. L. Rev. 1309, 1316. In the case of some such offenses, the federal statute contains a provision barring federal prosecution for the "same act or acts" constituting the offense where there has been a judgment of conviction or acquittal under the laws of a state. E. g., 18 U. S. C. 659 (stealing from interstate carrier); 18 U. S. C. 660 (misapplication of funds by officer or employee of interstate carrier); 18 U. S. C. 1992 (wrecking interstate train); 18 U. S. C. 2117 (entering vehicle containing interstate shipment with intent to commit larceny). In the absence of such a statutory bar, however, such offenses are punishable by both sovereignties. See *California v. Zook*, 336 U. S. at 732, and the other cases cited in the text *supra*, p. 10.

circumstance to operate as a bar to enforcement of the state statute. The court below seems to have regarded sedition as an offense against the United States alone. But this suggestion overlooks the legitimate interest of the states, explicitly recognized by this Court (see pp. 11-12, *supra*), in protecting themselves by constitutional means against internal subversion.

The majority below further reasoned that, if state sedition laws survived the passage of the Smith Act, not only would it be possible for a state and the federal government both to punish the same seditious conduct, but (R. 59):

> * * * if each of the other forty-seven States had a Sedition Act like Pennsylvania's, one chargeable with sedition against the government of the United States could be indicted, convicted and punished in any or all of such States as were able to obtain service of their criminal process upon him * * *.

This view, however, is clearly untenable. Sedition, to be punishable by a state, must be committed within that state. For as the majority below itself observed elsewhere: "A state's jurisdiction of crimes can extend only to acts committed within its borders." (R. 58). For this reason a seditious act or utterance occurring in one state could not be punished by another state merely because the offender chanced thereafter to place himself within the reach of that other state's